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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 1121

WILLOW FARMS DAIRY, INC., AND
KENNETH BARRICK, ET AL.,
Petitioners,

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,
AND UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Index to Petition

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	4
Statute Involved	4
Statement:	
The Proceedings	4
Background of First and Second Questions	6
Background of Third Question	9
Background of the Fourth Question	11
Reasons for Granting the Writ	12
Conclusion	16

Table of Cases

Brannan v. Stark (1952), 342 U.S. 451	15
Stark v. Wickard (1944), 321 U.S. 288	14, 15
U.S. v. Rock Royal Coop (1939), 307 U.S. 533	13
U.S. v. Ruzicka (1946), 329 U.S. 287	15

Index to Appendix

Statutes	S.C. App. 1
Opinion of the Court of Appeals	S.C. App. 14-31
Order Denying Rehearing En Banc	S.C. App. 31-32
Opinion of the Court of Appeals Denying Rehearing	S.C. App. 33-37
Order Denying Rehearing	S.C. App. 37-40

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Willow Farms Dairy, Inc., plaintiff, and Kenneth Barrick and thirty-three other producer farmers, intervening plaintiffs, pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit entered in the actions entitled "Willow Farms Dairy, Inc. and Kenneth Barrick, et al. v. Orville L. Freeman, Secretary of Agriculture (4th Circuit Appeal No. 8779)"; and "United States of America v. Willow Farms Dairy, Inc. (4th Circuit Appeal No. 8775)".

CITATIONS TO OPINIONS BELOW

The opinion of the judicial officer of the Secretary of Agriculture is printed in 21 A.D. 823 (App. 149).[1] The opinion of the District Court is reported in 206 F. Supp. 239 (App. 205). The opinion of the Court of Appeals is printed in the appendix hereto (S.C. App. 14). The opinion overruling the motion for a rehearing is printed in the appendix hereto (S.C. App. 33).

JURISDICTION

The principal action on which this petition hinges originated as a petition filed with the Secretary of Agriculture pursuant to 7 U.S.C. Section 608c(15)(A) to have him declare that Milk Marketing Order No. 127 was not in accordance with law. From an adverse decision by his judicial officer, a petition for review was filed in the United States District Court for the District of Maryland pursuant to 7 U.S.C. Section 608c(15)(B). From a judgment overruling the Secretary's decision, the Secretary appealed to the United States Court of Appeals for the Fourth Circuit, which rendered its opinion, reversing the District Court on March 11, 1963 (S.C. App. 14). It filed a supplemental opinion denying a motion for reargument on April 26, 1963 (S.C. App. 33).

An enforcement action brought by the United States against Willow Farms pursuant to 7 U.S.C. Section 608c(6)

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[1] Citations to the record in this petition are as follows: The Secretary's "Appendix for Appellants" filed in the Court of Appeals (a gray pamphlet) is cited "App. ". This is Volume I in the record from the Court of Appeals. *Nine copies are filed with this petition.* Willow Farms' appendix, which is attached to its brief filed in the Court of Appeals (a blue pamphlet) is cited "W.F. App. ". It is in the record at page i. *Nine copies are filed with this petition.* The appendix hereto, containing statutory material and opinions of the Court of Appeals is cited "S.C. App. ". The part of the record from the Court of Appeals which is not printed is cited "S.C. Record ".

is also involved. But it is of secondary importance; and the issues presently involved will be decided in the other action. On December 21, 1962, the two actions were ordered consolidated for purposes of hearing on appeal (S.C. Record 59). The enforcement action is joined in the present petition primarily to insure that the stay granted by the Court of Appeals will be applicable to it until the other action is decided.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

(1) Must the Secretary of Agriculture relate minimum prices fixed in a Milk Marketing Order to the parity price of milk distributed in the marketing area?

(2) Must the promulgation record disclose that he has done so?

(3) May the Secretary deny farmers who are affected by a Milk Marketing Order, the right to vote in a referendum held to determine the approval of producers?

(4) Is Milk Marketing Order No. 127 (now No. 16) regulating the handling of milk in the "Upper Chesapeake Bay, Maryland, Area" discriminatory against a class of handlers such as Willow Farms?

STATUTE INVOLVED

The statutory provisions involved are 7 U.S.C. Section 602 and Section 608c. They are printed in S.C. App. 1 attached hereto.

STATEMENT

The Proceedings

C. A. Appeal No. 8779: This proceeding was instituted by Willow Farms before the Secretary of Agriculture on October 18, 1960, to have Order No. 127 declared "not in accordance with law" pursuant to 7 U.S.C. Section 608c (15)(A). Upon an adverse decision of the Secretary, Willow Farms filed its complaint in the District Court to review the Secretary's decision pursuant to 7 U.S.C. Section 608c(15)(B). Thirty-four farmers who produce milk for Willow Farms were thereupon permitted to intervene as parties plaintiff.[2] The District Court filed its opinion (App.

[2] The Secretary originally objected but made no point of the court's order permitting this intervention in its brief on appeal.

205) and entered a decree (App. 239) declaring the Order "not in accordance with law". The Secretary's appeal was heard by a two-judge bench of the Fourth Circuit, and that court reversed the lower court (for opinion see appendix hereto, S.C. App. 14). Thereafter a motion for reargument en banc was overruled (S.C. App. 32). An alternative motion for reargument was then overruled by the two-judge court which had heard the case in the Court of Appeals (for opinion see appendix hereto, S.C. App. 33).[3]

C. A. Appeal No. 8775: This is an enforcement action brought by the United States against Willow Farms. A preliminary injunction requiring Willow Farms to pay moneys into court pending a final decision in the other case (App. 94) was modified by the District Court after filing of its opinion striking down the Milk Marketing Order, but a stay was granted in so far as moneys deposited in court pending an appeal by the Government (App. 239). After the Secretary's appeal, the Court of Appeals modified the original stay order by requiring Willow Farms to continue its deposit of funds in court pending the outcome of the appeal (see S.C. Record 59). By order dated December 21, 1962, the two actions were consolidated for purpose of hearing on appeal.

The basic facts upon which the petitioners rely are all admitted in the record.[4] The questions presented are thus

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[3] Although the opinion of the District Court was rendered with regard to this and other cases, the record in this case is different from the other records, and the hearings before the Secretary and the District Court occurred at different times. The Government filed an appendix on appeal to the Court of Appeals which conglomerates our record with other records. This was cause for complaint by us in the Court of Appeals. In our references we have been careful to refer only to papers in our own record.

[4] The District Court required the Secretary to admit or deny a detailed statement of facts stated in the complaint filed in that court

reduced to questions of law. The following is an explanation of the issues.

Background of First and Second Questions

Milk Marketing Orders are issued under authority granted to the Secretary of Agriculture by 7 U.S.C. Section 602 and Section 608c. Section 602 states the declared policy of the Act. The relevant portions of the declared policy in Section 602 are:

(1) To maintain such orderly marketing conditions as will establish parity prices to farmers [Section 602(1)].

(2) To protect the interest of the consumer by authorizing no action which will maintain prices above the prices declared to be the policy of the Act [Section 602(2)].

In the case of milk, the declared policy stated in Section 602(1) is modified by 7 U.S.C. Section 608c(18) which reads in part:

> "The prices which it is declared to be the policy of Congress to establish in Section 602 of this title shall for the purposes of such agreement, order or amendment be adjusted to reflect the price of feeds, the available supplies of feeds and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order or amendment relates."

Section 602(2) is not modified.

(see opinion, App. 210). The complaint contains record references to all allegations of fact. A marginal notation shows the facts admitted by the Secretary. The District Court's opinion is based on these admitted facts (App. 210). The complaint, with marginal notations, appears at W.F. App. 1-20. (Blue pamphlet 9 copies filed herewith.)

Section 608c(4) requires that the Secretary shall issue an Order, if he finds and sets forth in such Order, upon the evidence introduced at such hearing, that the issuance of the Order will tend to effectuate the declared policy. Section 608c(18) requires that, before issuing an Order fixing minimum prices of milk, the Secretary shall first ascertain the parity price of the milk to be regulated; then determine whether the parity price is reasonable in the light of specified local conditions; and if "upon the basis of the evidence introduced at the hearing" he finds that the parity price is not reasonable, then he shall fix such prices "as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest".

The Order which was issued contained the following finding:

> "'Upon the basis of the evidence introduced at such [the promulgation] hearing and the record thereof, it is found . . .
>
> (2) The parity prices of milk as determined pursuant to section 2 of the Act *are not reasonable* in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, *and the minimum prices specified in the order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;*" (App. 51) (Italics ours.)

This recitation is substantially in the words of the statute [7 U.S.C. Section 608c(18)]. However, in the present proceeding *the Secretary stipulated* that there was no evidence or exhibit in the promulgation record which relates to a specific parity price;[5] and that the record contains no find-

[5] See Stipulation, W.F. App. 40; also admitted facts, paragraph 19(d), W.F. App. 24-25.

ing of a specific parity price.[6] Furthermore, in answer to written interrogatories, the Secretary admitted that he did not base his findings of fact upon any evidence or exhibits outside of the record.[7]

In defense of the Order, the Secretary relied upon the suggestion that in a publication known as "Agricultural Prices" he had published — among several hundred other items, a listing of the parity price of "all milk wholesale" (milk sold throughout the United States for fluid or other purposes). He states that this constituted an "ascertainment" of the parity price of milk required by Section 608c(18). Of course, the parity price of "all milk wholesale" even if "ascertained" by the Secretary, could have nothing to do with a determination under Section 608c(18) that the parity prices of milk *sold in the marketing area* are unreasonable; nor could it have anything to do with an adjustment to parity prices of such milk to reflect economic conditions in the area (see District Court's opinion, App. 220). As above shown, the Secretary does not pretend that it does. It is his contention that, having "ascertained" the parity price of "all milk wholesale", and having declared it to be "unreasonable", he may proceed without further regard to parity.

The Secretary's contentions are inconsistent with the practice of former Secretaries where orders contain a finding that: "The parity prices of milk produced *for sale*

[6] See W.F. App. 40; and paragraph 19(i), W.F. App. 25.

[7] Interrogatory No. 14 to the Secretary read as follows:

"14. Did you base any of your findings of fact set forth in the Federal Register of November 24, 1959, at pages 9441 to 9456 [reprinted App. 1 to 81] upon evidence or exhibits which were not part of the hearing record? If so, please state in general terms the evidence (other than the hearing record upon which you relied" (App. 178).

The Secretary's answer is "No" (App. 181). (Gray pamphlet 9 copies filed herewith.)

in said marketing area as determined pursuant to Section 2 of the Act are not reasonable . . ." (see District Court's opinion, App. 221-2).

The District Court rejected the Secretary's contentions (App. 217-227). The Court of Appeals was, however, persuaded that this was a sufficient compliance with the Order. Fundamentally, the matter comes down to the Secretary's contention that the Secretary is not bound by the parity restrictions, and that he can issue any price regulation under Section 608c(18) which he believes to be in the public interest.

Of course, the Secretary's contentions relating to parity are not apparent in the promulgation record. The "ascertainment" argument was made for the first time in this proceeding.

Background of the Third Question

Milk Marketing Orders may be issued by the Secretary by consent of the industry [7 U.S.C. Section 608c(18)], or without consent [7 U.S.C. Section 608c(9)]. If without consent, the Secretary must make preliminary findings as a condition to his issue of the Order, which include a finding that the issuance of such order is the only practical means of advancing the interests of the producers of the milk which is subject to the Order; and that it is approved or favored by two-thirds of the producers who have been engaged in the production of such milk for sale in the marketing area [Section 608c(9)(B)].

Order No. 127 divides the farmers who ship milk into the marketing area into those who are "producers" *(as defined by the Order)*; and those who are not "producers" (as defined by the Order). With certain exceptions, a "producer" (as defined by the Order) is a farmer who

ships to a "pool plant" [Order, Section 1027.2(e); Section 1027.3(b); App. 54-56]. Both "pool plants" and "non-pool plants" are subject to regulation with regard to fluid milk sold in the marketing area. Minimum prices are set for "producer milk" (as defined by the Order); and "other source milk".[8] It will thus be seen that two types of farmers are affected by the Order: Farmers who are "producers" as defined by the Order; and farmers who are producers of "other source milk", but who are not "producers" as defined by the Order. There is no definite proof as to how many farmers there are who ship "other source milk", but there are a considerable number (see paragraph 15(a)-15(d), W.F. App. 19-26). While there is no proof, it is probable that if all farmers were permitted to vote, the opponents of the Order would defeat it in a referendum held at the present time.

When the Secretary approved the terms of the Order, he issued instructions for a referendum but limited those eligible to vote to "producers as defined by the Order".[9] When the Secretary finally issued the Order, it contained the following:

> "(c) *Determinations.* It is hereby determined that:
> * * *
>
> (2) The issuance of this order is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order; and
>
> (3) The issuance of this order is approved or favored by at least two-thirds of the producers who participated in a referendum and who during the determined representative period were engaged in the production of milk for sale in the marketing area."

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[8] For definitions of various classifications of milk see Order Section 1027.4; App. 57-58. For price fixing see Section 1027.50, App. 67; Section 1027.62, App. 71.

[9] For detailed admitted facts see paragraphs 16(a)-16(h), W.F. App. 20-22

In view of the instructions regarding the referendum mentioned above, it is clear that only producers as defined by the Order were permitted to vote and the District Court so found (App. 229).

Background of the Fourth Question

The present Order was issued upon the application of the Maryland Cooperative Milk Producers, Inc. (the "Coop"), whose members are limited to farmers holding health permits issued by the Baltimore City Health Department. Farmers holding those permits are "City farmers". The Coop sells its milk to handlers whose pasteurization plants are located in Baltimore City. We call these handlers "City handlers". Baltimore Health Department rules prevent handlers whose pasteurization plants are located outside the City (herein called "county handlers") from selling milk in Baltimore City. The Baltimore City Health Department will not issue a permit to a county handler; and will revoke a farmer's permit of a City producer who sells even a part of his milk to a county handler. County handlers' milk cannot be sold in the City. *These rules are enforced.*[10] Willow Farms, as a county handler, is called upon to make payments into a producer settlement fund of about $2,657.00 a month, and in addition it is required to pay an average of about $338.00 a month as an administrative assessment and is required to withhold about $355.00 a month from its farmers for "marketing services". This is typical of the effect of the Order upon a county handler. Substantially all of the money in the producer settlement fund goes directly or indirectly to the Coop.[10a]

[10] See admitted facts, paragraphs 9(a)-9(l), W.F. App. 10-12.

[10a] The Coop has received directly or through H. E. Koontz Creamery between 95%-99% of all distributions from the fund. See Sealed Exhibit specially certified by Clerk of Court of Appeals.

In the light of this situation, the District Court held that the Order was discriminatory saying:

> "The Secretary argues that a handler may not complain because one producer or group of producers receives greater benefits from the pool than another. Perhaps that is true in the ordinary case. But this is not an ordinary case since the very purpose of including the rural counties in the Order was to benefit not only certain producers but also the city handlers as against plaintiffs and other small county handlers. That may not legally be done.
>
> In any event, the farmers who sell to plaintiffs and other county handlers have a right to complain, because they are losing the differential which they have heretofore earned by controlling their surplus. They are being forced to contribute to a pool from which they can derive no benefit, which was set up to cure a problem they did not create, and which operates, as it was intended to operate, for the sole benefit of the farmers who produce for the city market, the Cooperative and the city handlers . . ." (App. 233-234).

The Court of Appeals held that there was doubt as to the constitutionality of the Baltimore City Health ordinance and regulation, hence the county handlers and their producers were not discriminated against. It passed over the important point, i.e.: Whether or not the ordinance and regulations are subject to attack, *they are enforced*. So long as they are enforced, the county producers and handlers cannot contribute to milk surpluses in the City.

REASONS FOR GRANTING THE WRIT

1. When the Supreme Court first passed upon the validity of the Milk Marketing Act, a strong contention was made that the Act did not prescribe proper standards, and hence was a delegation of legislative power. The Supreme Court rejected this argument because it found that the

Secretary was instructed to follow the policies prescribed by Congress in Section 602 and Section 608c(18).

U. S. v. Rock Royal Coop (1939), 307 U.S. 533, 576-7.

The decision of the Court of Appeals discards these policies and in substance holds that having "ascertained" a figure called "parity", the Secretary can disregard it. The effect is to eliminate the standards relied upon by the Supreme Court in Rock Royal.

2. It is apparent that the Secretary does not interpret the Act to require that he relate his minimum prices to parity. This conclusion is recognized by the Report to the Secretary of Agriculture by the Federal Milk Order Study Committee April 1962, which is referred to by the District Court (App. 209). We quote from the District Court's opinion:

> "The Report states, at p. III-8, 'It is the judgment of this committee that the price "parity" formula, however tenable in 1933 (in a "temporary emergency" act) is economically unsuitable for fluid milk. It has in fact been superseded in the order program by the "public interest" criterion, implemented by supply-and-demand pricing'" (App. 223).

If this Court does not correct the Secretary's interpretation of the Act, he will have successfully written out this whole section of the law. The Court of Appeals' conclusion that the Secretary can satisfy the statutory requirements in so far as parity is concerned by this "ascertainment" of parity, is in substance a holding that the Secretary must make a salute to Congress, and then act on his own.

3. The question of "producer approval" is of equal public importance. Mr. Justice Frankfurter stressed the importance of the producer referendum as follows:

> "Nor are these [rights to appear at a promulgation hearing] the only or the most effective means for safeguarding the producer's interest. While an order may be issued despite the objection of handlers of more than 50% of the volume of the commodity covered by the order, no order may issue when not approved by at least two-thirds — either numerically or according to volume of production — of the producers. Section 8c 9."
>
> *Stark v. Wickard*, 321 U.S. 288, 318 (Frankfurter, J. dissenting).

If the Secretary can in effect restrict voting power of producers to a class of producers, he has eliminated the only other restriction which is imposed by the Act. The District Court recognized the importance of an unrestricted right of producers to vote. Its reasoning is persuasive (App. 227).

4. There can be no doubt that the present Order imposes a tremendous hardship on county handlers and their producers in favor of the City handlers and producers, and in particular the Maryland Cooperative Milk Producers, Inc., whose membership is restricted to City producers. The District Court's finding that this discrimination was illegal (App. 231) emphasizes the importance to the public of a decision by the Supreme Court determining what are the Secretary's duties when he issues an order. If he has authority, in effect, to eliminate county handlers from the picture in favor of more centralized control by the City producer Coop, it is of vital importance to the entire community that the public be so informed.

5. We stress the fact that the record presented to this Court is ideal for a clear-cut decision on the points involved. The facts are not in dispute; and it is rare indeed that an appeal from an administrative action comes up on such a clear-cut record as appears in this case. Furthermore, farmers who produce milk for Willow Farms are

intervening plaintiffs in the present proceedings; and many of the procedural obstacles to a clear-cut decision on the issues involving the same section of the law are eliminated. Up to the present time, litigation coming to this Court must have been brought either by the handler in the locality of the Order under 7 U.S.C. Section 608c(15)(B); or from a complaint by producers who must institute litigation in the District of Columbia.

Stark v. Wickard (1944), 321 U.S. 288;
Brannan v. Stark (1952), 342 U.S. 451.

This was not the case when the validity of the Act was considered in *U. S. v. Rock Royal Coop* (1939), 307 U.S. 533; but since that time each issue has been bisected into a decision relating solely to producers on the one side, or solely to handlers on the other.

6. The position of a handler who wishes to complain regarding an Order is extremely precarious. He is not permitted to defend an enforcement action—

U. S. v. Ruzicka (1946), 329 U.S. 287.

and litigation originated before the Secretary under 7 U.S.C. Section 608c(15) is so slow that a small handler with a legitimate complaint can be out of business before his complaint has been litigated. For this reason, it is of the utmost importance to all handlers to have a definitive decision on the important questions here involved.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

STATUTES

The pertinent parts of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, are the following:

7 U.S.C. 601

It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 602

It is declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers parity prices as defined by section 1301(a)(1) of this title.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(3) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608, 608a, 608b, 608c, 608d-612, 613-619, 620, 623, and 624 of this title, to establish and maintain such minimum standards of quality and maturity and such grading and inspection requirements for agricultural commodities enumerated in section 608c(2) of this title, other than milk and its products, in interstate commerce as will effectuate such orderly marketing of such agricultural commodities as will be in the public interest.

(4) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601-608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for any agricultural commodity enumerated in section 608c(2) of this title as will provide, in the interests of producers and consumers, an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices.

7 U.S.C. 608a(6)

The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title, in any proceeding now pending or hereafter brought in said courts.

* * * * * *

7 U.S.C. 608c(1)

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any

agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(2)

Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional, or market classification, of any such commodity or product: Milk, fruits (including filberts, almonds, pecans and walnuts but not including apples, other than apples produced in the States of Washington, Oregon, and Idaho, and not including fruits, other than olives, for canning or freezing), tobacco, vegetables (not including vegetables, other than asparagus, for canning or freezing), soybeans, hops, honeybees and naval stores as included in sections 91-99 of this title and standards established thereunder (including refined or partially refined oleresin).

7 U.S.C. 608c(3)

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for hearing upon a proposed order.

7 U.S.C. 608c(4)

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity.

7 U.S.C. 608c(5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary

of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketing of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the

next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

7 U.S.C. 608c(6) — not applicable

7 U.S.C. 608c(7)

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. 608c(8)

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or

product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c(9).

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing

what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. Section 608c(10)

(10) *Manner of regulation and applicability.*

No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

7 U.S.C. 608c(11) — not applicable.

7 U.S.C. 608c(12)

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval

or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

7 U.S.C. 608c(13)(A)

No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

7 U.S.C. 608c(14) — not applicable.

7 U.S.C. 608c(15)(A)

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to the subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties and covering the same subject matter, instituted pursuant to this subsection.

7 U.S.C. 608c(16) and (17) — not applicable.

7 U.S.C. 608c(18)

The Secretary of Agriculture prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available sup-

plies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. 608c(19)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of sections 601-604, 607-608a, 608b, 608c, 608d, 608e-1 to 612, 613, 614-619, 620, 623 and 624 of this title, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision, shall be held to be complied with it, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a

basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

OPINION OF THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
(Filed March 11, 1963)

No. 8774

United States of America,
Appellant,

versus

Howeth M. Mills and Crawford Mills, as individuals, and Howeth M. Mills and Crawford Mills, d/b/a Mills Dairy Products Company, a co-partnership,
Appellees.

No. 8775

United States of America,
Appellant,

versus

Willow Farms Dairy, Inc.,
Appellee.

No. 8776

United States of America,
Appellant,

versus

Brice G. Twilley, individually, and Brice G. Twilley, d/b/a Twilley's City Dairy,
Appellee.

No. 8777

United States of America,

Appellant,

versus

Nesbit C. Murphy, individually, and Nesbit C. Murphy, d b a Shiloh Dairy Farms,

Appellee.

No. 8778

Howeth M. Mills and Crawford Mills, individually and as co-partners, d b a Mills Dairy Products Company, a co-partnership, Nesbit C. Murphy, an individual, d b a Shiloh Dairy Farms, and Brice G. Twilley, an individual d b a Twilley's City Dairy,

Appellees,

versus

Orville L. Freeman, Secretary of Agriculture,

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs,

Appellees,

versus

Orville L. Freeman, Secretary of Agriculture,

Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Roszel C. Thomsen, District Judge.

No. 8849

United States of America,
Appellant and Cross-Appellee,

versus

Royal Farms Dairy, Inc.; Wilton Farm Dairy, Inc.; and W. S. Hebb and Lorraine D. Hebb, co-partners, d/b/a Aristocrat Dairy,
Appellees and Cross-Appellants.

Cross-Appeals from the United States District Court for the District of Maryland, at Baltimore.
Roszel C. Thomsen, District Judge.

Appellant.

(Argued January 10, 1963. Decided March 11, 1963.)

Before Sobeloff, Chief Judge, and Bryan, Circuit Judge.

Richard S. Salzman, Attorney, Department of Justice, (Joseph D. Guilfoyle, Acting Assistant Attorney General; Joseph D. Tydings, United States Attorney; Alan S. Rosenthal, Attorney, Department of Justice; Neil Brooks, Assistant General Counsel, and J. Charles Krause, Joseph A. Wash, Attorneys, Department of Agriculture, on brief) for Appellants in Nos. 8774 to 8779, both inclusive; Charles G. Page (White, Page & Lentz on brief) for Appellees in Nos. 8775 and 8779; Robert F. Skutch, Jr., and Ben Ivan Melnicoff (Weinberg & Green on brief) for Appellees in Nos. 8774, 8776, 8777 and 8778. No briefs filed nor oral argument in No. 8849.

ALBERT V. BRYAN, Circuit Judge:

A Federal Milk Marketing Order for the Upper Chesapeake Bay area, including Baltimore, was struck down by the District Court at the suit of four dairies located

within this part of Maryland but outside the City. The United States appeals, contesting the fatal infirmities found by the Court in the Order. The suit, we think, should not have succeeded.

The Order in question, designated as No. 127, was issued under the Agricultural Marketing Agreement Act of 1937 (reenacting and amending the Agricultural Adjustment Act, 1935) as amended. 7 U.S.C. §601 et seq.* It regulated the marketing of milk in Baltimore, in all the counties on the Eastern Shore and in several on the west of Chesapeake Bay adjacent to Baltimore. Pursuant to the Act the Order fixed minimum prices to the farmers — known as producers—for milk purchased from them by dairies—known as handlers—selling fluid milk in the marketing area. The necessity of milk regulation, as well as the modus operandi of a Milk Order, has been fully explained in United States v. Rock Royal Co-op., 307 U.S. 533, 542-550, 571 (1939) and, as its general structure and operation are not now in controversy, no further exposition is requisite. Likewise the interstate nature of the milk operations here is not questioned.

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* The issue of the validity of the Order is here in seven appeals. In Nos. 8774, 8775, 8776 and 8777, the United States obtained decrees under § 608a(6) of the Act enforcing the Order against Mills Dairy, Willow Farms Dairy, City Dairy and Shiloh Dairy. Subsequently in a joint suit, No. 8778, Mills, Guy and Shiloh, and in a separate suit, No. 8779, Willow Farms, by way of a review of the Order under § 608c(15)(B) obtained the decree invalidating it. Thereupon the Court suspended the enforcement decrees. In these six cases the United States appeals to set aside the invalidation decree. In addition, there is an appeal by the United States, No. 8849, involving a joint decree of enforcement against Royal Farm Dairy, Wilton Farm Dairy and Aristocrat Dairy, which the Court later set aside but required compliance with the Milk Order for several months. The United States there too seeks to set aside the vacation of the Order; the dairies appeal against the compliance decreed for these months.

The opinion will consider the validity of the Milk Order as the common question in all of these appeals. Inasmuch as this determination will be decisive of all the appeals, no separate consideration need be given each decree.

The Act seeks "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . ." §602(1). For definition of "parity prices" it refers to the Agricultural Adjustment Act, 7 U.S.C. §1301(a), prescribing an arithmetical method of their computation. Generally, it is the price which would give farm commodities the purchasing power approximating what they possessed from 1910 to 1914, the years just before World War I. This aim of the statute is to be achieved through "the exercise of the powers conferred upon the Secretary of Agriculture" by the Act, which also made stipulations for the protection of the consumer. The instrument afforded the Secretary to accomplish the purpose was an agreement with the farmers and handlers of a selected area or, failing agreement then an order of the Secretary, establishing in the area minimum prices for sales by producer to handler.

In the present case no agreement was obtained and the Secretary promulgated the price order before us. Effective January 1, 1960, it was based upon conditions canvassed in August 1959. It classified milk, as required by the statute, according to the form or purpose for which it was to be used: Class I covering milk sold for fluid use and Class II for that to be manufactured into other dairy products. §608c(5). The minimum prices fixed per hundredweight were: $5.10 for Class I in the months of March through June, and $5.55 from July through February, and a lower figure set for Class II according to a stated formula.

Vitiation of Order 127 was placed by the District Court upon the following premises:

(1) That the Secretary in establishing the Order failed to "find", but merely "ascertained", the parity price of milk — and even then the national, not the local figure — and failed to show the process of the adjustment of it to the minimum prices fixed by the Order;

(2) That the referendum among the producers required by the Act, upon the question of whether an Order should

be promulgated was illegal because the Secretary unduly restricted the eligibility of the voters; and

"(3) That the marketing area fixed by the Order embraces rural counties along with the City to the detriment of the county handlers.

I. Before issuing an order in respect to milk or its products, the Act demands that the Secretary "ascertain the parity prices of such commodities". It then declares that the parity prices called for in the Act's recital of Congressional purpose, noted *ante*, shall "be adjusted to reflect the price of feeds, the available supply of feeds and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated . . . order . . . relates". Further, if "the Secretary finds, upon the basis of the evidence adduced [at the administrative hearing preliminary to the promulgation of the order] . . . that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supply of feeds, and other economic conditions . . . , he shall fix such prices as he finds will reflect such factors . . . and be in the public interest". §608c(18).

No evidence, concededly, was taken by the Secretary in the administrative proceedings relating to the parity price and on that point he made no "finding". But he did "ascertain" the parity price: $4.93 for August and the remainder of 1959 except $4.91 in October. This was done by calculation under the formula set forth in the Agricultural Adjustment Act, 7 U.S.C. §1301(a)(1) to which, as already mentioned, the Marketing Act refers for definition of parity price. In this reckoning he had access to "Agricultural Prices", an official monthly publication of the Department of Agriculture giving parity prices, average prices paid for feeds and other economic factors. The bulletin apparently is generally known by farmers and dairymen.

Entire compliance with the Act, we think, appears of record in this case. After stating the formula, §1301(a)(1) continues:

> "(D) The prices and indices provided for herein, and the date used in computing them, shall be determined by the Secretary, whose determination shall be final."

Following is §1301(c):

> "The latest available statistics of the Federal Government shall be used by the Secretary in making the determination required to be made by the Secretary under this chapter."

"Parity price" is thus an official Government figure and the Secretary is commanded to adopt it. In this view, no evidence was appropriate in its determination. In the absence of some indication that the parity intended by the Act was a local price, we have no reason to think so. This is confirmed by such legislative history as we find on §608c(18), *supra* — the section requiring the ascertainment of parity price — which was brought into the Act by amendment in 1937. The House Report thereon reads:

> ". . . The proposed amendment recognizes this, and provides that if the Secretary finds that the *national* parity price for milk does not adequately reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area to which the marketing agreement or order relates, he shall fix such prices as will reflect such factors, insure a sufficient quantity of pure wholesome milk, and be in the public interest." [Accent added.] H.R. Rep. No. 468, 75th Cong., 1st Sess. (1937).

The Senate Report rather joins the House Report in the thought that local situations were to be satisfied by trimming or increasing the parity prices through consideration of local conditions. This strongly implies that the parity price to begin with is the national figure. S. Rep. No. 565, 75th Cong., 1st Sess. (1937).

But parity price, whether national or local, is only the point of a progression to minimum prices, merely a refer-

able figure and in no sense final. Although, as heretofore noticed, the policy statement in the Act, §608c(18). Reasonable price, not parity price, is what the Secretary must "find".

He has done this in §1027.0(a)(2) of the Order:

> "The parity prices of milk as determined pursuant to section 2 of the Act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk and be in the public interest;"

True, this is a paraphrase of §608c(18), but it has firm basis in the record. In arriving at this determination, the Secretary had before him in the promulgation hearing evidence of the cost of feed, wage rates, demand and deliveries of milk, both nationally and in Maryland, as well as comparisons of related items in adjacent regulated areas, all covering an expanse of several years. In his decision the Secretary looks for "adequate but not excessive supplies" of milk. At considerable length he discusses relevant conditions in the Washington, D.C., Philadelphia and New York-New Jersey markets, concluding the section of his decision on prices with a clear indication that he had in mind "cost factors affecting the supply and demand for milk".

Therefore, it cannot be justly said that the Secretary's finding of parity price or of adjusted or reasonable price was procedurally faulty and not resting on substantial evidence.

II. The point next made to invalidate the Order relates to the requirements of electors in the referendum on the adoption of the Order. The District Court agreed with the appellee dairies that the eligibility rules imposed by the Secretary were illegal in not permitting all producers to vote.

Before a Milk Order may be issued the Secretary must, under the Act, give due notice of a hearing upon the proposed Order. At such hearing — known as the promulgation hearing — evidence may be introduced in respect to the need for the order. §608c(3). If then the Secretary finds that the issuance of an order "will tend to effectuate the declared policy" of the Act, he shall issue it. §608c(4). But when, as here, the handlers have failed to agree to it, no order can become effective unless and until the Secretary determines that the failure would tend to prevent attainment of the declared policy of the Act, that the order is the only practical way of advancing the interest of the producers, and that the order is approved:

> "(i) By at least two thirds of the producers . . . who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or
>
> "(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order." §608c(9)(B)

For the purpose of the referendum producer was defined in the Order in this way:

> "(e) 'Producer' means any dairy farmer, except . . . a dairy farmer for other markets, who produces milk which is received at a pool plant or is diverted to a nonpool plant during any month(s) of March through August or on not more than 8 days (4 days in the

> case of every-other-day delivery) during any month(s) of September through February: Provided, That the milk so diverted shall be deemed to have been received by the diverting handler at a pool plant at the location from which it was diverted"; §1027.2(e),

and "who, during the representative period [August 1959], were engaged in the production of milk for sale within the aforesaid marketing area." Obviously the qualifications set forth in the Order do narrow the reference in the statute to those persons who must approve the order — the "producers". But the statute itself contains no definition of "producer". Therefore, we think the Secretary had the right to define "producer", and to fit the qualifications of the producer-voter, according to the proposition on referendum. H. P. Hood & Sons v. United States, 307 U.S. 588, 597-98 (1939); United States v. Wrightwood Dairy Co., 127 F. 2d 907, 911 (7 Cir. 1942).

The Order in question dealt only with fluid milk received at, or diverted from, a pool plant as such a plant was described in the Order. All producers making such deliveries were made eligible to vote. True, the definition in the Order did by its terms exclude some farmers who produced milk for sale generally in the respective periods and in the marketing area, and so literally were within the statutory provisions for a referendum. But those producers who did not deliver to pool plants in the area were not directly touched by the Order, and hence were not deprived of a substantial right by the Secretary's definition of a voter. The tally was 1663 in favor of the Order, 192 against. No rejection of even one proffered ballot has been shown. In sum, we think the Secretary did not misconstrue the Act.

The creation of a marketing area, it cannot be overstressed, does not inhibit a producer located within the area from selling his milk elsewhere. He need not associate himself with the geographical market of his residence or dairy. The Order rules him only if and when he participates in the local market.

III. Inclusion with the City of Baltimore of counties outside of its limits in constituting the marketing area of the Order is attacked by the appellee dairies — all located beyond the city limits — as unwarranted and prejudicial. Their argument is that they are not a part of the Baltimore community, that they had no milk problem, that it existed alone in the City of Baltimore and that the only farmers and handlers involved in the problem were those of Baltimore. With this position we cannot agree.

The *problem* in milk marketing is clearly stated in United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, 549-50:

> "The problems concerned with the maintenance and distribution of an adequate supply of milk in metropolitan centers are well understood by producers and handlers. . . . It is generally recognized that the chief cause of fluctuating prices and supplies is the existence of a normal surplus which is necessary to furnish an adequate amount for peak periods of consumption. This results in an excess of production during the troughs of demand. As milk is highly perishable, a fertile field for the growth of bacteria, and yet an essential item of diet, it is most desirable to have an adequate production under close sanitary supervision to meet the constantly varying needs. . . . Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less nonperishable products. Since these manufactures are in competition with all similar dairy products, the prices for the milk absorbed into manufacturing processes must necessarily meet the competition of low-cost production areas far removed from the metropolitan centers. The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. . . ."

Without regulation in a metropolitan center experience showed that the competition to sell milk for fluid use became

so intense that it led to violence as well as economic distress to the farmers with dangerous disruption of the marketing of milk. Nebbia v. New York, 291 U.S. 502, 516-518 (1934).

In the present case, after deciding as a result of the promulgation hearing that a Milk Order was necessary in and around Baltimore, the Secretary laid out the Upper Chesapeake Bay Marketing Area and embraced in it not only Baltimore but nine counties on the Eastern Shore — that is, on the far side of Chesapeake Bay from Baltimore — five entire counties on the Western Shore adjacent to Baltimore and portions of two others. In sketching these boundaries the Secretary obviously concluded that the area met the approved test: it was a practical homogenous territory of control, fairly encompassing the Baltimore milkshed. *Cf.* United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, 576. This conclusion we think has not been proved wrong.

Fighting the placement of counties with Baltimore, the appellee dairies first point out that they do not, and by virtue of a city ordinance they cannot, sell milk in Baltimore, and so should not be tied into its market. The validity of such a municipal law is questionable. Dean Milk Co. v. Madison, 340 U.S. 349 (1951); Supplee-Willis-Jones Milk Co. v. Huntington Williams, decided July 9, 1956 by the Baltimore City Circuit Court. Actually, however, it does not appear that these county dairies ever tried to enter Baltimore or, indeed, wished to do so.

That milk-wise the City and the counties have a community interest has been clearly established. In 1959 in excess of 50% of the fluid milk dispensed on the Eastern Shore came from the City dairies. A subsequent investigation in 1961 showed that almost 80% of the total distribution on the Eastern Shore was furnished from Baltimore. Furthermore, a major part of the milk sold by producers on the Eastern Shore for fluid use was purchased by the Baltimore companies. As to the Western Shore counties, the Secretary found that there the greater part of the fluid milk commerce was carried on by the Baltimore handlers.

Combination of counties with a metropolitan city is not irregular. The Milk Order considered in United States v. Rock Royal Co-op., *supra*, 307 U.S. 533 brought together New York City and three nearby counties.

Again, the entire marketing area delineated by Order 127 is largely constituted of producers having a common interest. They are present throughout the territory. The bond is evidence by their organization into the Maryland Co-operative Milk Producers Association, Inc. (Co-op). It has a membership of 1800 farmers and sells about 75% of all the milk sold in Baltimore.

The assertion by the appellee dairies that they have no problem and should not, therefore, be covered by the Order, is not altogether correct in premise or sound in conclusion. The record shows that the Co-op initiated the movement that culminated in the Order. It shows, too, that producers in the area, including the Co-op, had endeavored to market their milk without the aid of an order. The Secretary has found that this endeavor was not a success. Although the Co-op had sought to maintain fair prices to the farmers through agreements with handlers, this had failed and stability of the milk market was seriously threatened. The Secretary's decision states, after exploring and expounding the cause of the disruption, that:

> "It is concluded that the issuance of marketing agreement and order for the Upper Chesapeake Bay marketing area is necessary to re-establish market stability and assure a continuing adequate supply of pure and wholesome milk for the market. . . ."

While the appellee dairies may not have been affected by the market disturbance described by the Secretary, there is no reason to think they would not be in the future and that Order 127 did not in some measure prevent the dairies from feeling the disturbance. This is true because undoubtedly all the area milk prices had in the past been reflective of the Co-op price; they had been geared to Co-op's. In any event, the Secretary had to view the situation as a whole and deal with it as an entirety. In the

circumstances we are not willing to say that the Secretary was clearly mistaken in his determination that appellees' marketing operations ought to be included with those handlers and producers contributing to the Baltimore market supply.

IV. Attacks on the Order other than those just discussed as urged before the District Court, are made in this appeal by the appellee dairies and their intervening farmer-producers. The first is that the Examiner, with the subsequent approval of the Judicial Officer, refused to admit evidence offered by the dairies in the administrative proceeding, on their petition was under §608c(15)(A), seeking rescission of the Order by the Secretary. In this ruling we perceive no error.

This section of the Act contemplates a review of the correctness of the Order in law. It does not afford a de novo trial. Relief may be asked solely on the ground that the Order "is not in accordance with law". Obviously, such a review is based upon the record made and concluded in promulgation of the Order. No additional proof is permissible; the Order must stand or fall upon the proof and findings there. Beatrice Creamery Co. v. Anderson, 75 F. Supp. 363, 367 (D. Kan. 1947). See Ogden Dairy Co. v. Wickard, 157 F. 2d 445, 447 (7 Cir. 1946), *cert. denied*, 330 U.S. 827 (1947); Bailey Farm Dairy Co. v. Jones, 61 F. Supp. 209, 217 (E.D. Mo. 1945), *aff'd.*, 157 F. 2d 87 (8 Cir.), *cert. denied*, 329 U.S. 788 (1946); Queensboro Farm Prod., Inc. v. Wickard, 47 F. Supp. 206, 210 (E.D.N.Y. 1942), *aff'd.*, 137 F. 2d 969 (2 Cir. 1943). To allow evidence would be to reopen, rather than to judge, the promulgation proceeding.

Another attack is directed at the status given the Order to Co-op and to H. E. Koontz Creamery, Inc. (Koontz) in respect to its manufacturing and supply plant located in Westminster, Maryland. Koontz is also a Baltimore handler but the grievance, and our discussion, here is confined to its Westminster plant, some 30 miles from the city. Both Co-op and Koontz are classified as pool plant handlers — as explained presently — and this, say the dairies, un-

fairly confers upon them the protection given handlers by the Order when the Co-op is in actuality a producer only and Koontz a manufacturer of Class II milk rather than a bottler. This plaint involves the whole design of milk-marketing regulation.

In effectuation of the policy of the Act, under the Order the Secretary fixes minimum prices to be paid the farmers for their milk according to the use to which it is devoted, that is: Class I for fluid use and Class II for manufacture, as we have already outlined. Thereafter the proceeds of the sales of both classes are ordered pooled, and that total then divided by the quantity of all milk sold. The result is to give an average, between the Class I and the lower Class II price, known as the "blend" price. This is the price to be paid each farmer for his milk regardless of the use to which it has been put.

To operate this plan, the Order establishes pool plants. These are simply the plants of the handlers regulated by the plan. Each handler must pay the producer at the rate of the minimum price fixed by the Secretary for each class of milk. This the handler does by paying the farmer the blend price. However, as all the handlers cannot use all their milk in fluid form, the Order creates a means of equalization among them known as the settlement fund. It protects each handler by assuring reimbursement to the extent the handler has paid its farmers, through the blend price, more than the milk is worth to it.

The fund works in this way. Each handler which has used its milk as Class I, and so received a greater value for it than it paid the farmer, pays this excess into the settlement fund. The handler who has used its milk as Class II, and so received a lesser value for the milk than it paid the farmer, may then draw its reimbursement from the fund. This discussion omits, as immaterial here, reference to certain charges made against the handler and producer to cover the cost of operating the fund. It is plain that the settlement fund is merely a means of evening handlers' outlays for milk.

The first grievance of the appellee dairies — that the Co-op is made a handler — is that the Order thereby allows Co-op to draw upon the settlement fund into which they have paid. In practice it withdraws far more than any other handler, except sometimes Koontz, and if Co-op were merely a producer it could never draw thereon. In addition the complaint is that Co-op is permitted, as a handler, to divert milk into non-pool plants — not regulated by the Order and principally manufacturing facilities — with the result that it receives lower prices and thereby builds up its demand on the settlement fund.

This situation was closely scrutinized by the Secretary before shaping the Order. Foremost it must be kept in mind that no matter how much Co-op takes from the settlement fund, neither this fact nor the Order *requires* the appellee dairies to pay the producer at any rate above the minimum prices set by the Order. Furthermore, the Co-op absorbs for the most part the whole obligation of providing reserve or standby milk for Baltimore. It also disposes of all Class II milk for its large membership. Obviously these circumstances furnish ground for constituting the Co-op a handler. The Co-op would not, of course, by preference and through diversion sell its milk at lower prices than it could possibly obtain, for this would mean a diminution of the blend price and so reduction of the amount to be paid its members. We think the Secretary was not without ground for his classification of the Co-op.

It must be recalled that the Order is principally for the economic protection of producer and consumer, that the Co-op is actually its farmers, and that so long as another handler is not unjustly treated, the Order may be drawn to enhance the position of the producer. "If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market" is not objectionable. United States v. Rock Royal Co-op, *supra*, 307 U.S. 533, at 560.

The accusation against the Order in respect to Koontz is the same as that directed at Co-op but is premised on

Koontz' dual posture. At Westminster, Koontz does not deal in the sale of Class I milk; it is primarily a manufacturer. Hence it is not there a handler as ordinarily understood in the Order — it has no pool plant for fluid milk. Nevertheless the Order accords Koontz the character of a handler, and as such it participates in the settlement fund as a drawer. It is at this the appellee dairies take offense.

Of course Koontz-Westminster is in an anomalous position. But the Secretary found, and we think on ample ground, that it is a justified anomaly. Carefully considering the part played by Koontz in the milk market, he found that it performed a highly valuable function. Its plant at Westminster serves as a storage place for the milk of the Co-op farmers pending its disposition, and Koontz also provides an outlet for Class II milk in its manufactory. If it is not classed as a pool plant, each farmer will have to build his own bulk storage tank at considerable expense. Taking into consideration all of these features, the Secretary cannot be said to be arbitrary in allowing Koontz to be a handler.

The standing of the appellee dairies to raise and press the last two objections is quite questionable. These relate to the operation of the settlement fund, which in no wise affects parity or minimum prices. United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, at 560. The handler is not hurt unless it is required to pay an unreasonable price for its milk. This is not alleged by appellees. No substantial harm to them is demonstrated in these objections but we have passed upon them, as apparently did the District Court, to avoid later uncertainty or litigation about the points.

After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its disposition. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some re-

sultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. United States v. Rock Royal Co-op., *supra*, 307 U.S. 533, 568-81. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot "produce complete equality, for the variables are too numerous", he "fulfills his role when he makes a reasoned" Order. Mitchell v. Budd, 350 U.S. 473, 480 (1956).

In conclusion, we reiterate that in this suit the District Court and this Court examine the case solely from a legal standpoint. They do not consider the evidence before the Secretary otherwise than to be assured his findings have support. The criterion is whether the Order is "in accordance with law". Here we cannot say it does not square with the law.

The judgment of the District Court invalidating Federal Milk Marketing Order No. 127 (now No. 16) will be reversed and the causes now in review — in Appeals Nos. 8774, 8775, 8776, 8777, 8778, 8779 and 8849 — will be remanded to the District Court for the enforcement of the said Order in each of them, all cross appeals being denied.

Reversed and remanded.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs,

Appellees,

versus

Orville L. Freeman, Secretary of Agriculture,

Appellant.

No. 8775

United States of America,
Appellant,

versus

Willow Farms Dairy, Inc.,
Appellee.

ORDER DENYING REHEARING EN BANC

(Filed April 25, 1963)

Upon consideration of the petition of Willow Farms Dairy, Inc., et al., appellees in cases No. 8779 and 8775, for a rehearing en banc, the Court is of the opinion that no adequate ground is alleged to justify a consideration of the said petition by the Court en banc, and, therefore, it is

ORDERED that the said petition insofar as it seeks a hearing en banc be, and it is hereby, denied, but that the said petition be referred for consideration to the division of this Court which heard the argument on the appeal of these cases.

SIMON E. SOBELOFF,
Chief Judge of the
Fourth Circuit.

CLEMENT F. HAYNSWORTH, JR.,
United States Circuit Judge.

HERBERT S. BOREMAN,
United States Circuit Judge.

ALBERT V. BRYAN,
United States Circuit Judge.

J. SPENCER BELL,
United States Circuit Judge.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Filed April 26, 1963)

No. 8774

United States of America, Appellant,

versus

Howeth M. Mills, et al., Appellees.

No. 8775

United States of America, Appellant,

versus

Willow Farms Dairy, Inc., Appellee.

No. 8776

United States of America, Appellant,

versus

Brice G. Twilley, et al., Appellee.

No. 8777

United States of America, Appellant,

versus

Nesbit C. Murphy, et al., Appellee.

No. 8778

Howeth M. Mills, et al., Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs, Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8849

United States of America, Appellant and Cross-Appellee,

versus

Royal Farms Dairy, Inc., et al., Appellees and Cross-Appellants.

Per Curiam:

In cases Nos. 8779 and 8775, in which Willow Farms Dairy, Inc. and certain intervening producers were the appellees, a petition has been filed by them for a rehearing by the Court en banc or, in the alternative, before the division of the Court which heard the appeal. By an order heretofore entered the request for an en banc court has been denied. However, the original panel has now considered the petition and finds no ground for granting it.

While Willow Farms with its intervenors did request that the appeals in their cases be heard separately and apart from those in the companion suits, we concluded that it was advisable to hear all of them at one time,* very much as the District Court had done, affording respective counsel for each of the several appellees an opportunity to be heard. Some common questions ran through all the actions and we believed that a joint presentation would more fully develop the points not only for the Court but for the benefit of every party. At all events, in the consideration of the record, briefs and oral arguments the Court was cognizant of such differences in the circumstances and conditions as existed as to some of the parties and weighed their contentions with that in mind.

* This is in error. The Willow Farms cases were heard on separate days and on different records. Counsel for Willow Farms was not present when the other cases were heard.

Reference to the opinion of the Court will disclose that it discussed in detail the point now reiterated on the present petition in respect to parity price. To repeat, no *finding* of fact was made of this item by the Secretary of Agriculture. He made only an *ascertainment* by reference to certain official Government data of which he must under the statute take notice. Consequently, the testimony of the Secretary quoted in the petition is not to the contrary: that he did not "base any of (his) *findings* of fact . . . upon evidence or exhibits which were not a part of the hearing record".

Again, the petitioners are mistaken in their implication that the Court did not accord them legal standing to raise the points discussed in part IV of the opinion. It shows that these contentions were decided notwithstanding the Court had some doubt of the locus standi of the appellees to raise them.

On the last ground of the petition, only two judges heard the appeal because the third judge who was assigned to the case and had theretofore participated in one of the preliminary hearings — Judge Soper — was ill on the day of argument. He did not take part in the subsequent conferences on the case and died before its decision.

In other papers the present petitioners have asked the Court to stay its mandate and execution of its order herein until they have the opportunity of presenting a petition for certiorari to the United States Supreme Court. This suspension has been opposed by the United States both in its answer to the motion of these appellees as well as on its own motions for immediate release of the mandate and enforcement of the Milk Order as upheld in the opinion. The stay, we think, should be granted. Willow Farms from the inception of the Milk Order has punctually deposited into the registry of the trial court all moneys payable under the Milk Order. While consideration has been given to the view earnestly urged by the Government in respect to the injurious results of such a stay, in our judgment these appellees should be allowed the stay, with the understanding, of course, that Willow Farms will continue to

make the requisite payments into the registry of the District Court. In view of the stipulation previously made between the Government and Wilton Farm Dairy, Inc. — that the latter would abide the decision of the present controversy on the appeal of Willow Farms — the same stay will be awarded Wilton in case No. 8849, and on the same terms, as here permitted Willow Farms.

On the other hand, we do not now grant the motion of Mills et al., appellees in cases Nos. 8774 and 8778, for a similar stay because, since the issuance of the Milk Order, they have never set aside from their gross receipts any moneys to meet their obligations thereunder, or otherwise indicated a good faith intention to comply therewith, subject to the decision of the courts on the validity of the Order. Contempt proceedings in this Court were necessary to enforce payments for January and February, 1963 even into the registry of the District Court pendente lite. Moreover, the March assessment is currently overdue. To allow Mills, et al. to continue in disregard and default of the Milk Order would, we think, defeat the policy of the Agricultural Marketing Agreement Act, 7 U.S.C. §§601, 608c(15)(B), to the effect that proceedings testing the validity of a milk order should not delay the relief envisioned by the Act. Of course, any stay whatsoever will have this result in some degree, but whenever granting a stay in this litigation we have balanced the equities between the handler and the producer, and where they are found to favor the handler without undue injury to the producer, we have impinged upon the policy of the Act in order to prevent apparently irretrievable harm to the handler pending appeal. This entrenchment upon the policy is minimized by insisting upon continuance of the payments although they are put into the registry of the District Court. When, however, the handler makes no effort to meet the policy of the Act, as have Mills, et al., and thus to entirely thwart it, we do not feel justified in granting a stay which would abet the intransigent handler.

Nevertheless, if within 10 days of the entry of the order accompanying this opinion, appellees Mills, et al. pay into

the registry of the District Court all the sums accrued and payable by them under the Milk Order from its effective date until the present time, the Court on proof thereof will grant them a stay of its mandate and order to the same extent it has been allowed to appellees Willow Farms, et al.

In No. 8849, appellee Aristocrat Dairy moves to deny the Government's motion from an immediate mandate and enforcement of our order and itself moves for a stay of the order. This appellee has made the required milk payments into the registry of the District Court save for the month of March, 1963. Upon meeting this current obligation, Aristocrat's motion will be granted upon the same terms and conditions as have heretofore been allowed in the instance of Willow Farms.

Order in Accordance with Foregoing Opinion.

April 25th 1963.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

(Filed April 26, 1963)

No. 8774

United States of America, Appellant,

versus

Howeth M. Mills, et al., Appellees.

No. 8775

United States of America, Appellant,

versus

Willow Farms Dairy, Inc., Appellee.

No. 8776

United States of America, Appellant,

versus

Brice G. Twilley, et al., Appellee.

No. 8777

United States of America, Appellant,

versus

Nesbit C. Murphy, et al., Appellee.

No. 8778

Howeth M. Mills, et al., Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8779

Willow Farms Dairy, Inc., and Kenneth Barrick, et al., intervening plaintiffs, Appellees,

versus

Orville L. Freeman, Secretary of Agriculture, Appellant.

No. 8849

United States of America, Appellant and Cross-Appellee,

versus

Royal Farms Dairy, Inc., et al., Appellees and Cross-Appellants.

ORDER DENYING PETITION FOR REHEARING IN NOS. 8779 AND 8775, AND RULING ON MOTIONS OF THE UNITED STATES FOR ISSUANCE OF MANDATE AND ON MOTIONS OF CERTAIN APPELLEES FOR STAYS PENDING APPLICATION FOR CERTIORARI.

Upon consideration of the petition for rehearing by the Willow Farms Dairy, et al., appellees in cases Nos. 8779 and 8775; the motions of the United States and Orville L.

Freeman, Secretary of Agriculture, the appellants in all of these cases, for issuance of mandate and immediate enforcement of the order of this Court entered March 11, 1963; the memorandum of Howeth M. Mills and Crawford Mills, etc., appellees in cases Nos. 8774 and 8778 opposing appellants' motion for the issuance of mandate, and seeking a stay of mandate and relief from obligation to make payments pending review of the decision of this Court; motion of Wilton Farm Dairy, Inc., appellee in case No. 8849, to vacate the said order of this Court; and the motion of Aristocrat Dairy, another appellee in No. 8849 to stay mandate and the said order of this Court, it is, for the reasons set forth in the opinion this day filed,

ORDERED as follows:

1. That the said petition for rehearing be, and it is hereby, denied;

2. That, upon condition that they file their petition for certiorari to the United States Supreme Court within 30 days from this date, the said order of this Court entered on March 11, 1963 be, and it is hereby, stayed in cases Nos. 8779 and 8775 until said petition for certiorari is filed and, thereafter, until the said petition is acted upon by the United States Supreme Court;

3. That in case No. 8849, with respect to Wilton Farm Dairy, Inc. and Aristocrat Dairy the said order of this Court be, and it is hereby, stayed pending disposition of the petition for certiorari in cases Nos. 8779 and 8775, as outlined in paragraph 2 above;

4. That the motion for a stay by Howeth M. Mills and Crawford Mills, etc., appellees in cases Nos. 8774 and 8778, be, and it is hereby, denied, provided, however, that if they shall within 10 days from the entry of this order pay into the registry of the United States District Court for the District of Maryland the remainder of the moneys payable by them under Milk Order No. 16 from January 1, 1960, the effective date of said Milk Order, until the date hereof, the said order of this Court shall, on proof of said payment,

be stayed in the same manner and to the same extent as the stay hereinbefore granted to appellees Willow Farms Dairy, Inc., et al. in paragraph 2 of this order; and

5. That the said stays hereinbefore granted shall remain in effect only while the appellees procuring said stays shall continue to pay into the registry of the said District Court, as and when due, the moneys payable by them under the said Milk Order No. 16.

SIMON E. SOBELOFF,
Chief Judge of the Fourth Circuit.

ALBERT V. BRYAN,
United States Circuit Judge.

April 25th, 1963.

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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1962

WILLOW TAYLOR DARBY INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
1. Introduction	2
2. The marketing order	3
3. The instant cases	7
Argument	9
Conclusion	17
Appendix	19

CITATIONS

Cases:

Beatrice Creamery Co. v. *Anderson*, 75 F. Supp. 363	11
Benson v. *Schofield*, 236 F. 2d 719, certiorari denied, 352 U.S. 976	14
Dean Milk Co. v. *Madison*, 340 U.S. 349	16
H. P. Hood & Sons v. *Du Mond*, 336 U.S. 525	5
H. P. Hood & Sons v. *United States*, 307 U.S. 588	5, 9, 13, 14, 16
Nebbia v. *New York*, 291 U.S. 502	5
Stark v. *Wickard*, 321 U.S. 288	5
Supplee-Willis-Jones Milk Co. v. *Huntington Williams* (Baltimore City Circuit Court, decided July 9, 1956)	16
United States v. *Rock Royal Co-op.*, 307 U.S. 533	5, 9, 12, 14, 16, 17
United States v. *Ruzicka*, 329 U.S. 287	5, 18

888195—62——1

Cases—Continued

	Page
United States v. *Turner Dairy Co.*, 166 F. 2d 1, certiorari denied, 335 U.S. 813	12
United States v. *Wrightwood Dairy Co.*, 127 F. 2d 907	14
Willow Farms Dairy, Inc. v. *Benson*, 181 F. Supp. 802, affirmed, 276 F. 2d 856	8
Willow Farms Dairy, Inc. v. *Freeman*, 206 F. Supp. 239	8
Statutes:	
Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*:	
U.S.C. 601	19
7 U.S.C. 602	19
7 U.S.C. 602(1), as amended, 62 Stat. 1257–1258	10
7 U.S.C. 608a(6)	2, 19
7 U.S.C. 608c(1)	20
7 U.S.C. 608c(2)	20
7 U.S.C. 608c(3)	20
7 U.S.C. 608c(4)	21
7 U.S.C. 608c(5)	5, 21
7 U.S.C. 608c(5)(A)	4
7 U.S.C. 608c(7)	24
7 U.S.C. 608c(8)	6, 25
7 U.S.C. 608c(9)	26
7 U.S.C. 608c(9)(B)(i)	6
7 U.S.C. 608c(11)(B)	27
7 U.S.C. 608c(12)	28
7 U.S.C. 608c(13)(A)	28
7 U.S.C. 608c(15)(A)	8, 28
7 U.S.C. 608c(15)(B)	8
7 U.S.C. 608c(18)	8, 10, 12, 29
7 U.S.C. 608c(19)	6, 30
7 U.S.C. 1301(a)	10, 31
7 U.S.C. 1301(c)	11, 33
Baltimore City Code (1950) Art. 12, Sec. 15	16

Miscellaneous:

Agricultural Prices, U.S. Department of Agriculture 11
Federal Milk Marketing Order No. 16 (formerly No. 127) 3, 6, 8
7 C.F.R. §5.1 11
24 F.R. 11071, *et seq* 6

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1124

WILLOW FARMS DAIRY, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R. 205)[1] is reported at 206 F. Supp. 239. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 14) is not yet reported. The opinion of the court of appeals denying petitioners' motion for rehearing (Pet. App. 33) is not yet reported.

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[1] "R." refers to the separately bound printed appendix to the government's brief filed in the court of appeals, nine copies of which petitioner has filed in this Court. "Pet. App." references are to the appendix to the petition for a writ of certiorari.

JURISDICTION

The judgment of the court of appeals was entered on March 11, 1963 (Pet. App. 14). A timely petition for rehearing was denied on April 26, 1963 (Pet. App. 37). The petition for a writ of certiorari was filed on May 22, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, prior to the issuance of Federal Milk Marketing Order No. 16, the Secretary of Agriculture ascertained the parity price of milk in the manner prescribed by the Agricultural Marketing Agreement Act of 1937, as amended.

2. Whether the referendum to obtain producer approval of the marketing order was properly conducted.

3. Whether the Secretary was acting within his discretion in including the counties surrounding the City of Baltimore within the ambit of the marketing order.

STATUTE INVOLVED

The pertinent sections of the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, are set forth in the Appendix, *infra*, pp. 19–33.

STATEMENT

1. *Introduction*

This litigation involves two actions under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601 *et seq.* One is an enforcement action brought by the United States under 7 U.S.C. 608a(6) to obtain the compliance of petitioner Willow Farms with Milk

Marketing Order No. 16 (originally numbered 127) issued by the Secretary of Agriculture. The other was brought by that petitioner (and 34 of the dairy farmers who supply it with milk) against the Secretary, seeking judicial review of Milk Marketing Order No. 16 and challenging its validity. Willow Farms and the intervening farmers now seek review by this Court of the Fourth Circuit's decision upholding the marketing order and requiring compliance.

2. *The Marketing Order*

Under the Agricultural Marketing Agreement Act the Secretary of Agriculture is authorized, under certain conditions, to establish "marketing areas" and to regulate within those areas the marketing of certain agricultural commodities, including milk. In this case, after a public hearing, the Secretary promulgated Milk Marketing Order No. 16 on December 31, 1959 (R. 50–81). Order No. 16 governs the marketing of milk in a region centered on Baltimore, Maryland, and encompasses that city, together with surrounding Maryland counties on the western and eastern shores of Chesapeake Bay.

The provisions of this marketing order (in common with approximately 70 similar Federal Marketing Orders) operate directly upon the companies engaged in the business of selling and distributing milk and its products in the area. Under the Order, these regulated milk companies[2] were each required to pay

[2] The Agricultural Marketing Agreement Act governs the regulation by the Secretary of Agriculture of many diverse agricultural commodities. The Act refers to those who raise

not less than certain uniform minimum prices established by the Secretary for milk which they purchased from their dairy farmer suppliers. The applicable minimum price depended upon the use made by the milk company of the milk it purchased,[3] milk to be used in fluid form (Class I) being priced higher than milk for manufacturing into such items as butter and cheese (Class II). Milk that must be disposed of for manufacturing purposes is known as "surplus" and has traditionally commanded lower prices on the open market.[4]

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these commodities as "producers," and to those who distribute and market them as "handlers". As this case involves only the regulation of milk marketing, we shall refer here to the principals by their common descriptions, "farmers" and "milk companies."

[3] The Act also permits additional price differentials based upon such factors as the butterfat content of the milk, transportation factors, etc., 7 U.S.C. 608c(5)(A). None of these differentials are involved in these proceedings, however.

[4] In order to insure that it will at all times be able to meet the fluctuating daily consumer demand for fluid milk, the industry must carry a "surplus" of 20% over the average demand; however, because the herds naturally produce significantly more milk in the spring, to meet the needs in November necessitates more than a 50% surplus in June. "Surplus" milk is not wasted: it is manufactured into butter, cheese, powdered milk and similar items. However, these manufactured items are in direct competition with similar products made across the nation, often in areas with lower production costs and from milk of lower quality. Consequently, "surplus" milk can be sold only at a greatly reduced price. The cut-throat competition among the farmers for the more profitable fluid milk outlets led to violence and business practices which jeopardized the vital fluid milk supply. The Agricultural Marketing Agreement Act was enacted to control the situation. This Court has in many cases considered

The marketing order did not require the milk companies to pay those minimum class prices directly to the dairy farmers. Rather, as authorized by Section 8c(5) of the Act,[7] it contained provisions to insure that the rate of return to each dairy farmer for his milk was the same, regardless of the use made of it by the company to which he delivered the milk. The order accomplished this objective by means of a market-wide "pool." Monthly, each regulated milk company reports the value of its total sales of milk in each price class to a Market Administrator. That official totals the value of all the reported sales and divides that sum by the quantity of milk sold. The result is, of course, a weighted average between the Class I and the lower Class II price. This monthly average price, known as the uniform or "blend" price, is the minimum price required to be paid by the regulated milk companies to each farmer for his milk, regardless of the use to which the company has put it.

In recognition of the fact that all companies can be expected to have either a higher or a lower fluid milk utilization rate than the market-wide average (which the blend price reflects) and thus will be obligated (under the established class prices) for either more or less money than the amount paid to their farmers as the uniform blend price, the order established a

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the problems of the milk industry outlined above. See, *Nebbia* v. *New York*, 291 U.S. 502, 515–522; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 548–550; *H. P. Hood & Sons* v. *United States*, 307 U.S. 588; *Stark* v. *Wickard*, 321 U.S. 288; *United States* v. *Ruzicka*, 329 U.S. 287; *H. P. Hood & Sons* v. *Du Mond*, 336 U.S. 525.

[7] 7 U.S.C. 608c(5).

clearing house operation known as the producer settlement fund. Each company either pays into, or draws from, the fund the difference between the uniform blend price to its farmers and the value of its milk computed at the class prices. The operation of the fund has no effect upon the class prices.

Before the Upper Chesapeake Bay Marketing Order could be placed into operation, the Act required the Secretary of Agriculture to obtain the agreement of the milk companies to be regulated thereby, 7 U.S.C. 608c(8), or, failing that agreement, the approval of "at least two thirds of the producers * * * who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order * * *." 7 U.S.C. 608c(9)(B)(i).

The milk companies declined to give their consent to the proposed order. The Secretary thereupon submitted the proposed marketing order for the farmers' approval by means of a referendum, a method expressly permitted by Section 8c(19) of the Act.* The Secretary permitted every farmer whose milk would be subject to the minimum price and "pooling" provisions under the proposed order to vote in the referendum (R. 191–193). The result was 1,663 votes in favor of the proposed Order and 192 against (R. 192).

Accordingly, on December 31, 1959, the Secretary officially promulgated the order as Milk Marketing Order No. 127, (later renumbered 16), 24 F.R. 11071 *et seq.* (R. 50–81). The Order became effective for

*7 U.S.C. 608c(19).

reporting purposes on January 1, 1960 and for purposes of minimum price payments on February 1, 1960.

3. *The Instant Cases.*

Petitioner Willow Farms is a company engaged almost exclusively in the processing and sale of milk in fluid form and does the major portion of its business in Baltimore County and Carroll County, Maryland (R. 211). The other petitioners, who intervened in the district court, are 37 dairy farmers who supply it with milk. Baltimore County surrounds to landward the City of Baltimore, which is on Chesapeake Bay. Carroll County is adjacent and to the west of Baltimore County. Both these counties lie within the Upper Chesapeake Bay Marketing Area (R. 53), and Willow Farms Dairy is concededly a fully regulated milk company under the terms of Marketing Order No. 16 (R. 210).

From the Marketing Order's inception, Willow Farms failed to comply with its minimum price provisions, paying substantially less than the established Class I price for the milk which it used for fluid purposes. Accordingly, the United States, pursuant to 7 U.S.C. 608a(6), filed suit in the federal district court for Maryland to enforce petitioner's compliance with the marketing order (R. 85). In this enforcement action, Willow Farms Dairy, Inc., consented to the entry of a preliminary injunction against it (R. 94). Under that preliminary injunction, Willow Farms paid the amounts it owed the producer settlement fund into the registry of the district court.

In the interim, petitioner challenged the validity of the Milk Marketing Order in an administrative proceeding before the Secretary of Agriculture pursuant to 7 U.S.C. 608c(15)(A).[7] From the Secretary's decision rejecting its challenge (R. 149), Willow Farms sought judicial review in the district court, as provided in 7 U.S.C. 608c(15)(B).

On June 13, 1962, the district court handed down its opinion, *Willow Farms Dairy, Inc.* v. *Freeman*, 206 F. Supp. 239 (R. 205), and on June 26, 1962, entered its final judgment (R. 237–238), which held Milk Marketing Order No. 16 invalid.[8] The district court also released Willow Farms (and others) from their obligation to meet the minimum price requirements of the Order which it had agreed to pay into court in the enforcement action. The district court rested its decision on three grounds: (1) that under 7 U.S.C. 608c(18), and prior to setting minimum prices for milk, the Secretary of Agriculture had to "find" the parity price of milk upon evidence obtained at a hearing and make certain adjustments thereto, which he had failed to do; (2) that the Secretary had unduly restricted the class of dairy farmers entitled to vote in the referendum to determine whether to place the

[7] Petitioner had initially made an unsuccessful attempt to secure judicial review of the Marketing Order without exhausting its administrative remedies. *Willow Farms Dairy, Inc.* v. *Benson*, 181 F. Supp. 802 (D. Md.), affirmed, 276 F. 2d 856 (C.A. 4).

[8] Similar actions were brought by other milk companies, which, while not formally consolidated, were disposed of by the district court in a single opinion (R. 205).

marketing order into effect; and (3) that the order was discriminatory because it included within the same marketing area both the City of Baltimore and surrounding Maryland counties.

On March 11, 1963, the court of appeals reversed the decision of the district court. That court considered in detail, and rejected, each of the grounds assigned by the district court as a basis for holding the the marketing order invalid. It concluded that the Secretary had fully complied with the statutory requirements and ordered the marketing order enforced (Pet. App. 14).

On April 26, 1962, the court of appeals denied Willow Farms' motion for rehearing either by the sitting panel or *en banc* (Pet. App. 32, 33). It stayed, however, the effect of its mandate of enforcement pending consideration by this Court of Willow Farms' petition for certiorari.

ARGUMENT

This Court has previously held the Agricultural Marketing Agreement Act of 1937 to be constitutional and has approved, as authorized by that Act, milk marketing orders corresponding in all essentials to the one here questioned. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588. The court below determined that the marketing order under challenge was supported by substantial evidence in the administrative record and that its issuance complied with all statutory requirements. The decision is plainly cor-

rect. There is accordingly no occasion for further review by this Court.

1. Before the Secretary of Agriculture may issue a marketing order which fixes a minimum price to be paid to dairy farmers for milk or its products, Section 8c(18) of the Act[9] requires that he "shall ascertain the parity prices of such commodities." Petitioners claim (Pet. pp. 7–8) that this means that the Secretary must *find* that parity price upon evidence adduced at a hearing and that the parity price so "found" must be related to some *local* market.

This contention overlooks the provisions of the Act which specify the manner in which the Secretary shall compute parity prices. Section 2(1) of the Act[10] declares it to be the policy of Congress:

> Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, *parity prices as defined by section 301(a)(1) of* [the Act]. [Emphasis supplied.]

Section 301(a),[11] *infra*, pp. 31–33, in turn contains a complex formula required to be used in all parity price computations. Subpart D of that section specifically provides that:

> The prices and indices provided for herein, and the data used in computing them, shall be

[9] 7 U.S.C. 608c(18).

[10] 7 U.S.C. 602(1), as amended, 62 Stat. 1257–58.

[11] 7 U.S.C. 1301(a).

> determined by the Secretary, whose determination shall be final.

And Section 301(c)[12] adds that:

> The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this chapter.

It is a matter of record in this case that the Secretary computed the parity price for milk from the latest federal statistics according to the statutory formula, published and distributed those computations (along with parity figures for other commodities) monthly in the official department publication *Agricultural Prices*,[13] and reviewed those figures before he set about issuing the marketing order here challenged (R. 176–186). Moreover, nowhere in that formula is there even a suggestion that parity is anything but a national price, and, as the court of appeals pointed out, the legislative history of the parity price concept refers specifically to a national parity price (Pet. App. 20). Thus, the Secretary followed the statutory mandate. See also *Beatrice Creamery Co.* v. *Anderson*, 75 F. Supp. 363, 368 (D. Kan.).

Moreover, the Secretary did not, as petitioners suggest (Pet. 13), "disregard" the parity price which he ascertained. Rather, as the result of evidence taken at a public hearing (at which petitioners were represented), he found that the parity prices were unreasonable in view of the factors which section

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[12] 7 U.S.C. 1301(c).

[13] 7 C.F.R. § 5.1.

8c(18) of the Act[14] directed him to consider (R. 48). The Secretary went on to set minimum prices for milk reflecting the conditions he found, all of which he fully explained in his decision (R. 35–40).

This Court has already held that, under Section 8c(18) of the Act,[15] the Secretary may fix minimum prices without restriction to the parity prices if he finds that such prices are unreasonable in the marketing area under consideration. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 546. Accord, *United States* v. *Turner Dairy Co.*, 166 F. 2d 1 (C.A. 7), certiorari denied, 335 U.S. 813. Petitioners present no challenge here, nor did they below, to the reasonableness of the prices set by the Secretary. Nor did they allege that those prices are unsupported by substantial evidence in the record, as indeed they cannot. We submit, therefore, that on this point petitioners raise no new issues meriting consideration by this Court. Cf. *United States* v. *Turner Dairy Co., supra.*

2. Petitioners renew their claim below that the Secretary prevented some eligible farmers from voting in the referendum held to ascertain their approval of the marketing order. This contention is advanced notwithstanding the fact that more than 89% of the voting farmers gave approval to the order and, as the court of appeals observed, "[n]o rejection of even one proffered ballot has been shown" (Pet. App. 23). The reason for petitioners' inability to point to a

[14] 7 U.S.C. 608c(18).

[15] *Id.*

single disenfranchised farmer is that the Secretary fully complied with the injunctions of the Act.

As this Court observed in *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, 598, where this same issue was raised, "[t]he Act does not supply the Secretary with detailed directions as to the manner of holding a referendum. Its language is general. The Secretary 'may conduct a referendum among producers.' What producers? Those 'engaged in the production of [milk] for sale in the marketing area' . . .". In *Hood*, as in this case, the marketing order "pooled" the milk of the regulated milk companies (those doing a fluid milk business in the marketing area) and required only those companies to pay the minimum blend price to the farmers for their milk and to account to the producer settlement fund. In conducting the referendum upheld by this Court in *Hood*, the Secretary determined to be eligible to vote those dairy farmers who, during a representative period, delivered milk to a company which would be subject to the minimum pricing and pooling regulations under the order. This case is on all fours with *Hood*, for that is precisely what the Secretary did here. The pricing and pooling regulations of the marketing order here involved apply only to those milk companies which operate "pool plants" (R. 13). Every farmer who delivered milk to a "pool plant" during the representative period was permitted to vote (R. 191, 193). As previously noted, the result was

1663 in favor of approval of the order and 192 against.

Only the milk of those farmers who deliver to plants regulated under the marketing order is pooled and priced by the order. The milk of farmers not delivering to "pool plants" is neither subject to the minimum price provisions nor counted in the pool. As this Court ruled in *Hood*, the Seventh Circuit in *United States* v. *Wrightwood Dairy Co.*, 127 F. 2d 907, and the court below in this case, it is proper to restrict the referendum to those farmers delivering to regulated plants. See also, *Benson* v. *Schofield*, 236 F. 2d 719, 723 (C.A.D.C.), certiorari denied, 352 U.S. 976.

3. Petitioners' final contention relates to the geographical bounds of the marketing area as drawn by the Secretary. In essence, they urge that there are two distinct milk markets, Baltimore City and the surrounding counties. Only the Baltimore City market, they claim, had a milk surplus, and the Secretary therefore could not extend regulation to the counties.

This argument goes only to the sufficiency of the evidence in the record to support the Secretary's decision on the proper size of the market, as this Court has already found nothing *per se* improper in the inclusion of urban and rural communities in one milk marketing area. *United States* v. *Rock Royal Co-op.*, 307 U.S. 533.[16] As the court of appeals found

[16] In *Rock Royal* the milk market area there approved consisted of New York City and the then rural or suburban counties of Westchester, Nassau and Suffolk in New York State.

(Pet. App. 24–27), there was substantial evidence to support the Secretary's conclusion that the milk surplus problem, extant or incipient, threatened the stability of milk marketing in the entire area included in his marketing order. For the administrative record reflected and the Secretary found, *inter alia:* (1) that the milk companies with plants in Baltimore City sell more fluid milk in the surrounding counties than do companies in Willow Farms' position (R. 8–12); (2) that the milk companies located in Baltimore compete with companies in the surrounding counties for dairy farmers to supply them (R. 6–7); (3) that the prices paid by county companies such as petitioner for their milk were directly related to the prices paid by the Baltimore City companies (R. 4–5); and (4) that the county companies drew on the so-called city surplus when they needed additional milk supplies (R. 165).[17]

Petitioners' reliance upon the existence of a municipal ordinance, purporting to bar petitioner Willow Farms from selling milk in Baltimore City, is misplaced. As the court of appeals noted, "it does not appear that [Willow Farms] ever tried to enter Baltimore or, indeed, wished to do so." (Pet. App. 25). Moreover, the ordinance is of doubtful validity. The municipal ordinance involved is of the type which bars from sale within the city limits milk or milk products not bottled at a plant located inside the city

[17] See pp. 4–5, note 4, *supra*.

limits." In *Dean Milk Co.* v. *Madison*, 340 U.S. 349, this Court struck down such a municipal milk ordinance as unconstitutional. Furthermore, a Maryland court has already held the very Baltimore ordinance in question to be invalid insofar as it applies to sales of ice cream within the city limits. *Supplee-Willis-Jones Milk Co.* v. *Huntington Williams* (Baltimore City Circuit Court, decided July 9, 1956). It was not the force of the municipal ordinance but business competition which kept Willow Farms from Baltimore.

Petitioners' final attack on the configuration of the marketing area is against the producer settlement fund. Willow Farms complains that it has to pay into that fund, while in general only so called "Baltimore" companies and a dairy farmers' co-operative which supplies them draw from it. This, petitioners argue, means that Willow Farms is subsidizing those companies and that, under the order, its farmers unlawfully have to give up their good fluid milk market for the benefit of farmers who supply milk to the "city" handlers. This Court considered and rejected identical contentions in *United States* v. *Rock Royal Co-op., supra*, and *H. P. Hood & Sons* v. *United States*,

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"Art. 12, Sec. 15, Baltimore City Code (1950) provides in pertinent part:

No permit to pasteurize milk, cream, ice cream or other dairy products for sale in Baltimore City shall be granted to any person, firm or corporation whose plant shall be located beyond the corporate limits of Baltimore City.

307 U.S. 588. The Court there pointed out that the milk companies have no financial interest at all in the producer settlement fund, 307 U.S. at 561, and held that equalization pools are properly authorized by the Act. See 307 U.S. at 571–73. The court of appeals so held here.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied. It is further requested that action be taken on the petition at this Term. By order of April 26, 1963, the court of appeals granted petitioners' motion to stay its mandate pending action by this Court on the petition for certiorari (Pet. App. 38–40). As a result, that portion of the established minimum Class I price which the milk marketing order requires Willow Farms and the other regulated milk companies to pay to the producer settlement fund is, instead, being paid into the registry of the district court. This, in turn, has necessitated a significant reduction in the blend price returned to the approximately 2400 dairy farmers whose milk is pooled and priced under this order. If the petition is not acted upon at this Term, these farmers will continue to suffer a substantial loss of income until at least October. Additionally, we have been advised by the Department of Agriculture that it may be necessary to suspend the entire operation of the marketing order, with the likely consequence of severe disruption of milk marketing conditions in

the Upper Chesapeake Bay area. Cf. *United States* v. *Ruzicka*, 329 U.S. 287, 292–294.

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MAY 1963.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601 *et seq.*, provides in pertinent part as follows:

7 U.S.C. 601

> It is declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.

7 U.S.C. 602

> It is declared to be the policy of Congress—
>
> (1) Through the exercise of the powers conferred upon the Secretary of Agriculture under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices as defined by section 1301(a)(1) of this title.

* * * * * *

7 U.S.C. 608a(6)

> The several district courts of the United States are vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623 and 624 of this title, in any proceeding now pending or hereafter brought in said courts.

* * * * *

7 U.S.C. 608c(1)

The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

7 U.S.C. 608c(2)

Orders issued pursuant to this section shall be applicable only to (A) the following agricultural commodities and the products thereof (except products of naval stores and the products of honeybees), or to any regional or market classification, of any such commodity or product: Milk, * * *.

7 U.S.C. 608c(3)

Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

7 U.S.C. 608c(4)

After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing, (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to such commodity.

7 U.S.C. 608c(5)

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) *no others*:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payments to all producers and associations of producers delivering milk to the

same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval, or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

* * * * *

7 U.S.C. 608c(7)

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their powers and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agriculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph shall be deemed to be acting in an official capacity, within the meaning of section 610(g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

7 U.S.C. 608c(8)

Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such orders have signed a marketing agreement, entered into pursuant to section 608b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such orders have signed such a marketing agreement: *Provided*, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who during such representative period, have been engaged in the production of such commodity

for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

7 U.S.C. 608c(9)

Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as Cali-

fornia citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title with respect to such commodity or product, and

(3) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

* * * * * *

"7 U.S.C. 608c(11)(B)

Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional

production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

7 U.S. C. 608c(12)

Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

7 U.S.C. 608c(13)(A)

No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under sections 601–608, 608a, 608b, 608c, 608d–612, 613, 614–619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

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7 U.S.C. 608c(15)(A)

Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for

a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to the subsection shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 608a(6) of this title. Any proceedings brought pursuant to section 608a(6a) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection.

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7 U.S.C. 608c(18)

The Secretary of Agriculture prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying

the price fixed in any such term, shall ascertain the parity prices of such commodities. The prices which it is declared to be the policy of Congress to establish in section 602 of this title shall, for the purposes of such agreement, order, or amendment, be adjusted to reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 608b of this title or this section, as the case may be, that the parity prices of such commodities are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.

7 U.S.C. 608c(19)

For the purpose of ascertaining whether the issuance of an order is approved or favored by producers or processors, as required under the applicable provisions of sections 601–604, 607–608a, 608b, 608c, 608d, 608e–1 to 612, 613, 614–619, 620, 623 and 624 of this title, the Secretary may conduct a referendum among producers or processors and in the case of an order other than an amendatory order shall do so. The requirements of approval or favor under any such provision, shall be held to be complied

with if, of the total number of producers or processors, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the precentage required under such provision. The terms and conditions of the proposed order shall be described by the Secretary in the ballot used in the conduct of the referendum. The nature, content, or extent of such description shall not be a basis for attacking the legality of the order or any action relating thereto. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12) of this section.

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7 U.S.C. 1301

(a) For the purposes of this subchapter and the declaration of policy—

(1)(A) The "parity price" for any agricultural commodity, as of any date, shall be determined by multiplying the adjusted base price of such commodity as of such date by the parity index as of such date.

(B) The "adjusted base price" of any agricultural commodity, as of any date, shall be (i) the average of the prices received by farmers for such commodity, at such times as the Secretary may select during each year of the ten-year period ending on the 31st of December last before such date, or during each marketing season beginning in such period if the Secretary determines use of a calendar year basis to be impracticable, divided by (ii) the ratio of the general level of prices received by farmers for agricultural commodities during such period to the general level of prices received by farmers for agricultural commodities during the period January 1910 to December 1914, inclusive. As used in this subparagraph, the term "prices" shall include wartime subsidy payments made to producers under programs de-

signed to maintain maximum prices established under the Emergency Price Control Act of 1942.

(C) The "parity index," as of any date, shall be the ratio of (i) the general level of prices for articles and services that farmers buy, wages paid hired farm labor, interest on farm indebtedness secured by farm real estate, and taxes on farm real estate, for the calendar month ending last before such date to (ii) the general level of such prices, wages, rates, and taxes during the period January 1910 to December 1914, inclusive.

(D) The prices and indices provided for herein, and the data used in computing them, shall be determined by the Secretary, whose determination shall be final.

(E) Notwithstanding the provisions of subparagraph (A) of this paragraph, the transitional parity price for any agricultural commodity, computed as provided in this subparagraph, shall be used as the parity price for such commodity until such date after January 1, 1950, as such transitional parity price may be lower than the parity price, computed as provided in subparagraph (A) of this paragraph, for such commodity. The transitional parity price for any agricultural commodity as of any date shall be—

(i) its parity price determined in the manner used prior to the effective date of the Agricultural Act of 1948, less

(ii) 5 per centum of the parity price so determined multiplied by the number of full calendar years (not counting 1956 in the case of basic agricultural commodities) which, as of such date, have elapsed after January 1, 1949, in the case of non-basic agricultural commodities, and after January 1, 1955, in the case of the basic agricultural commodities.

(F) Notwithstanding the provisions of subparagraphs (A) and (E) of this subsection,

if the parity price for any agricultural commodity, computed as provided in subparagraphs (A) and (E) of this subsection appears to be seriously out of line with the parity prices of other agricultural commodities, the Secretary may, and upon the request of a substantial number of interested producers shall, hold public hearings to determine the proper relationship between the parity price of such commodity and the parity prices of other agricultural commodities. Within sixty days after commencing such hearing the Secretary shall complete such hearing, proclaim his findings as to whether the facts require a revision of the method of computing the parity price of such commodity, and put into effect any revision so found to be required.

(G) Notwithstanding the foregoing provisions of this section, the parity price for any basic agricultural commodity, as of any date during the six-year period beginning January 1, 1950, shall not be less than its parity price computed in the manner used prior to October 31, 1949.

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7 U.S.C. 1301(c)

The latest available statistics of the Federal Government shall be used by the Secretary in making the determinations required to be made by the Secretary under this chapter.

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